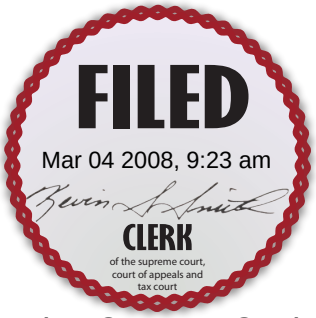

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IN THE
COURT OF APPEALS OF INDIANA

DANIEL V. BRILES,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 10A05-0706-CV-298
	)	
MAURICE D. COOPER and MUSSELMAN HOTELS, LLC,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Vicki Carmichael, Judge
Cause No. 10D01-0203-CT-52

March 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Daniel Briles appeals the trial court's granting of the motion for summary judgment filed by Musselman Hotels, LLC ("Musselman"). We reverse and remand.

Issue

Did the trial court err in granting Musselman's motion for summary judgment?

Facts and Procedural History

Musselman owns and operates the Courtyard by Marriott Hotel in Louisville, Kentucky ("the Hotel"). On March 10, 2000, a Musselman employee named Maurice Cooper was involved in a traffic accident while driving the Hotel's van. On March 5, 2002, Daniel Briles filed in Clark Superior Court a complaint against Cooper and Musselman, alleging that the collision was caused by Cooper's negligence and that Briles sustained personal injuries as a result. Briles's complaint alleged that Musselman was liable for Cooper's negligence under the doctrine of respondeat superior. On October 15, 2002, Musselman filed its initial motion for summary judgment, arguing that it was not liable under a respondeat superior theory because Cooper was not acting in the course and scope of his employment at the time of the accident. Briles filed a response, asserting that genuine issues of material fact precluded summary judgment. On February 11, 2003, Judge Vicki L. Carmichael denied Musselman's motion for summary judgment.

At the time of the accident, Wausau Insurance Companies provided coverage to Musselman under a business automobile policy ("the Policy"). On October 20, 2004, Wausau filed in Clark Superior Court a complaint for declaratory judgment, claiming that the Policy provided no coverage for the March 10, 2000, accident because Cooper was driving

the van without Musselman's permission. Wausau named Briles as a party in the declaratory judgment action. On January 24, 2006, Judge Jerome F. Jacobi held a bench trial. In the court's order on declaratory judgment, Judge Jacobi set forth the following findings of fact:

1. Maurice Cooper was employed by [Musselman] Hotels, LLC, to work as a van driver/bell[man] at [Musselman]'s Courtyard by Marriott in Louisville, Kentucky.
2. Terri Gregory was Cooper's immediate supervisor at the hotel.
3. The hotel's van was primarily intended to take hotel guests to/from the Louisville International Airport.
4. The hotel's van could be used to take hotel guests to other locations within a 5 mile radius of the hotel.
5. When deviating from the airport route, [Musselman]'s van drivers were supposed to notify the front desk and obtain permission to do so from the hotel manager or a supervisor.
6. The hotel's van was not to be used to transport non-guests of the hotel.
7. On March 10, 2000, Gregory was informed by her front desk clerk at the hotel that a man had entered the hotel and asked the hotel to call a taxi cab for him.
8. At that time, Gregory observed the man sitting in the hotel lobby and was told by her front desk clerk that the man was not a guest of the hotel.
9. Maurice Cooper then approached Gregory and requested permission to use the hotel's shuttle van to drive the man waiting in the lobby from Louisville to Southern Indiana and drop him off there.
10. Gregory told Cooper that he could not use the hotel van to transport the man, since the man was not a guest of the hotel and because Cooper had an airport run coming up.
11. Gregory was also concerned about traffic congestion in Southern Indiana caused by on-going road construction and told Cooper he could not drive the van to Indiana.
12. Cooper approached Gregory two (2) more times and requested permission to drive the man to Indiana using the hotel van.
13. Both times, Gregory denied Cooper permission to use the van to drive to Indiana.
14. Despite being told three (3) times that he [could] not use the hotel van to drive the man to Indiana, Cooper disobeyed Gregory and did in fact drive the man in the lobby to Southern Indiana, along Jeffersonville riverfront.
15. On his way back to the hotel, Cooper was involved in an auto accident, rear-ending Daniel Briles' vehicle on Interstate 65 at the Kennedy Bridge.
16. When he returned to the hotel, Cooper was suspended without pay for three days by Gregory.

17. When he returned following the suspension, Cooper's employment with [Musselman] was terminated by the hotel general manager, Verl Wilder, for insubordination in disobeying Gregory's orders not to transport a non-guest of the hotel to Southern Indiana.
18. Daniel Briles has filed suit against Cooper and [Musselman] Hotels, LLC, in Clark Superior Court, Cause No. 10D01-0203-CT-52.
19. At the time of the collision, [Musselman]'s van driven by Cooper was insured by Wausau Insurance Companies, policy #2331-00-063402.
20. The Wausau insurance policy contains the following omnibus clause:

BUSINESS AUTO COVERAGE FORM

> Throughout this policy the words "you" and "your" refer to the named insured shown in the Declarations…

SECTION II – LIABILITY COVERAGE

A. COVERAGE

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto…"
>
> We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost of expense." However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply…

I. WHO IS AN INSURED?

> The following are "insureds"
>
> a. You for any covered "auto."
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow…

SECTION V – DEFINITIONS

> "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage…
>
> 21. [Musselman] Hotels, LLC is the named insured under the policy. Accordingly, the word "you" in the policy refers to [Musselman] Hotels, LLC.

Appellee's App. at 1-4.

At issue in the declaratory judgment action was whether Cooper was an "insured" under the Policy. Judge Jacobi concluded as follows:

> 1. At the time of the accident, Maurice Cooper's permission to use [Musselman]'s hotel van was subject to the express restrictions on his use of the van placed by his supervisor, Terri Gregory.
> 2. At the time of the accident, Cooper had violated the expressed restrictions placed on his use of the van by Gregory.
> 3. Accordingly, Cooper's permission to use [Musselman]'s van terminated when he violated the express restrictions placed on his use of the van by Terri Gregory.
> 4. Since he did not have [Musselman]'s permission to use the hotel van at the time of the accident, Cooper was not an "insured" under Wausau's policy of insurance, as the policy defines that term.
> 5. Since Cooper was not an "insured" under the terms and conditions of Wausau's policy of insurance at the time of the accident, Wausau is not obligated by the contract of insurance to provide coverage for Cooper related to the accident.
> 6. Since Wausau is not obligated to provide coverage to Cooper under the terms and conditions of the policy, Wausau has no obligation to provide Cooper with a defense to Daniel Briles' lawsuit related to the accident, and has no obligation to indemnify Cooper for any judgment obtained against him by Daniel Briles related to the accident.

Id. at 4-5. Judge Jacobi's order was subsequently upheld on appeal. *See Briles v. Wausau Insurance Co*., 858 N.E.2d 208 (Ind. Ct. App. 2006).

On or about February 16, 2007, Musselman filed a renewed motion for summary judgment claiming that, based upon the doctrine of collateral estoppel, the findings of fact

and conclusions thereon from the declaratory judgment action conclusively resolved any factual disputes that may have previously precluded summary judgment in its favor. On March 21, 2007, Briles filed a response to Musselman's motion in which he claimed that factual disputes remained. On May 9, 2007, Judge Carmichael granted Musselman's motion for summary judgment. Briles now appeals.

Discussion and Decision

Briles contends that Judge Carmichael erred in granting Musselman's motion for summary judgment. He asserts that there remain genuine issues of material fact relevant to his tort claim which were not determined in the declaratory judgment action.

> Our standard of review for summary judgment appeals is well established. An appellate court faces the same issues that were before the trial court and follows the same process. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having its day in court.
>
> Summary judgment is appropriate only if the pleadings and evidence sanctioned by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper.

Asbestos Corp. v. Akaiwa, 872 N.E.2d 1095, 1096 (Ind. Ct. App. 2007) (citations and quotation marks omitted).

"Issue preclusion, often referred to as collateral estoppel, bars subsequent litigation of a fact or issue which was *necessarily adjudicated* in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit." *Am. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d

224, 230 (Ind. Ct. App. 2004) (emphasis added), *trans. denied*. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. *Id*.

In this case, the parties seem to agree that the legal conclusions made by Judge Jacobi in his declaratory judgment order do not address the same issue raised in Briles's lawsuit. In the declaratory judgment action, Judge Jacobi considered whether Cooper was a permissive user of Musselman's vehicle and thus an "insured" as defined by the Policy. In the instant case, Briles has raised the issue of whether Musselman is vicariously liable for Cooper's alleged negligence. Under the theory of respondeat superior, an employer is vicariously liable for the wrongful acts of employees committed within the scope of employment.[1] *Warner Trucking, Inc. v. Carolina Cas. Ins. Co.*, 686 N.E.2d 102, 105 (Ind. 1997).

The question is whether the Judge Jacobi's findings of fact in the declaratory judgment action are conclusive when applied to the issue of respondeat superior. According to Musselman,

> Wausau's Complaint for Declaratory Judgment asserted that its policy of insurance did not protect Cooper because Cooper utilized the company van without Musselman's permission at the time of the accident. Briles actively participated in such litigation. It makes no difference that the Declaratory Judgment action was premised on a separate claim from the action at issue. The facts relevant to a determination of the Declaratory Judgment action were identical to the facts relevant to a determination of the respondeat superior claim in the present action. Such facts were conclusively decided by [Judge Jacobi]when [he] issued the court's Findings of Fact and Conclusion of Law

[1] In his appellate brief, Briles also claims that Musselman should be held liable for its own negligence in hiring, maintaining, and training Cooper. Because Briles failed to raise this issue below, however, it is waived for our review. *See Graves v. Johnson*, 862 N.E.2d 716, 722 n.4 (Ind. Ct. App. 2007) ("Issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are waived.")

> on February 23, 2006. Applying such facts to the respondeat superior claim at issue, the trial court properly determined as a matter of law that Cooper did not act in the scope of employment.

Appellee's Br. at 8. Apparently, Judge Carmichael agreed with this position.[2] Briles argues that some facts relevant to a respondeat superior analysis remain disputed, and thus Judge Carmichael's order granting summary judgment should be reversed.

We agree that the facts relevant to a permissive use analysis differ somewhat from those relevant to a respondeat superior analysis. In his permissive use analysis, Judge Jacobi relied on several relevant findings of fact, including that the Hotel's written van driver job description stated that the van's primary purpose was to take Hotel guests to and from the Louisville International Airport, and that the Hotel van drivers "were supposed to notify the front desk and obtain permission to [deviate from the airport route] from the hotel manager or a supervisor." Appellee's App. at 2. Further, Judge Jacobi found that Cooper's supervisor had specifically instructed him on three occasions not to drive the man to Indiana. These facts clearly influenced the court's decision that Cooper was not a permissive user of the Hotel van at the time of the accident and was therefore not an "insured" under the Policy.

In our view, the facts found by Judge Jacobi in the declaratory judgment action do not so clearly dispose of the respondeat superior issue raised in Brile's tort action. In the declaratory judgment action, the court properly focused upon the question of whether, pursuant to the terms of the Policy, Cooper had his employer's permission to use the Hotel van to transport the man to southern Indiana on March 10, 2000. With regard to respondeat

[2] The trial court's brief order granting Musselman's motion for summary judgment does not reveal the basis of Judge Carmichael's decision.

superior, however, permission alone is not necessarily dispositive. As our supreme court has stated,

> [T]he existence of a rule prohibiting behavior is not solely determinative. An employer is vicariously liable for the wrongful acts of employees committed within the scope of employment. The critical inquiry is not whether an employee violates his employer's rules, but whether the employee is in the service of the employer. Even though an employee violates the employer's rules, orders, or instructions, or engages in expressly forbidden actions, an employer may be held accountable for the wrongful act if the employee was acting within the scope of employment. Acts done on the employee's own initiative, with no intention to perform it as part of or incident to the service for which he is employed are not "in the service of the employer" and are thus outside the scope of employment. However, an employee's wrongful act may still fall within the scope of his employment if his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominantly motivated by an intention to benefit the employee himself or if the employee's act originated in activities so closely associated with the employment relationship as to fall within its scope.

Warner, 686 N.E.2d at 105 (citations and some quotation marks omitted).

In his memorandum in opposition to Musselman's motion for summary judgment, Briles designated the depositions of Cooper and Gregory. Their testimony involves issues of material fact relevant to Briles's respondeat superior claim that were not expressly adjudicated in the declaratory judgment. For example, both Cooper and Gregory stated that the instructions within the Hotel van driver job description (e.g., "When deviating from normal airport transportation, obtain permission from a manager or supervisor.") were not consistently followed or enforced. Also, Cooper testified that the passenger in question told Cooper he was a guest of the Hotel, while Gregory testified that a front desk clerk informed her that the man was not a guest. *See* Appellant's App. at 113 ("PM Van Driver Job Description"). Finally, as noted above, Briles is bound only by the facts that were

"necessarily adjudicated" in the declaratory judgment action. *See Am. Family Mut. Ins. Co.*, 803 N.E.2d at 230. Therefore, for purposes of the instant case, the parties may relitigate any extrinsic determinations made by Judge Jacobi, *e.g.*, that Cooper's passenger was "not a guest of the hotel." Appellee's App. at 2.

Based on the above, we must conclude that there remain genuine issues of material fact relevant to a determination of respondeat superior that preclude summary judgment in Musselman's favor. We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

BAILEY, J., and NAJAM, J., concur.